IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

Lewis Long, et al.,

Plaintiffs,

v.

Hewlett-Packard Co.,

Defendant.

______________________________________/

NO. C 06-02816 JW

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS WITH PARTIAL LEAVE TO AMEND

I. INTRODUCTION

Lewis Long and Therry Simien (collectively, “Plaintiffs”) bring this diversity action against Defendant Hewlett-Packard Co. ("HP") alleging violation of California Business & Professions Code § 17200 et seq. and breach of express warranty resulting from HP’s sales of allegedly defective Pavilion notebook computers (“Pavilions”) to Plaintiffs. Before the Court is the Defendant's Motion to Dismiss. The Court found it appropriate to take the matter under submission without oral arguments. See Civ. L.R. 7-1(b). Based upon the papers submitted to date, the Court GRANTS Defendant's Motion to Dismiss with partial leave to amend.

II. BACKGROUND

Plaintiffs allege the following:

On June 10, 2002, Plaintiff Lewis Long ("Long"), a resident of North Carolina, purchased a Pavilion zt1000 notebook computer manufactured by HP, a California corporation headquartered in Palo Alto, CA. Two months later, the display on Long's

Pavilion began malfunctioning. A month before the expiration of the warranty, Long sent his Pavilion to HP to have it repaired. HP returned the Pavilion to Long in supposedly repaired condition. Four months later, after the warranty had expired, Long's Pavilion experienced similar display malfunctions. Upon inquiry, HP informed Long that it would charge $600 to complete the work. (Class Action Complaint for Violation of the Unfair Competition Law and Breach of Express Warranty ¶ 26, hereafter, "Complaint," Docket Item No. 1.)

Plaintiff Therry Simien ("Simien"), a resident of Texas, purchased an HP Pavilion xz133 notebook computer. Several months after purchasing her Pavilion, the display began to flicker. Simien did not return her computer to HP for repair. Two months after the warranty expired, the display on her Pavilion dimmed. Simien then contacted HP, who informed her that they would charge $350-$400 to diagnose the condition. (Complaint ¶ 27.)

Currently, both Plaintiffs cannot effectively use their Pavilions without the aid of an external monitor. (Id. ¶ 28.) This limitation deprives them of the Pavilions' mobility feature. HP marketed, advertised, and sold the Pavilions as portable computers. (Complaint ¶¶ 10, 12, 13.)

The Pavilions' display problems are due to defective internal component(s). (Complaint ¶¶ 13, 15, 18-19, 21-22.) HP learned of the defect through service calls and repair reports and identified the specific internal component(s) at fault. HP continued to sell the affected Pavilions without notifying customers of the defect. HP did not recall or adequately repair the computers at its own expense. (Complaint ¶¶ 15-19, 20, 22.)

Plaintiffs filed this suit alleging two causes of action, for (1) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. and (2) breach of express warranty. Presently before the Court is HP's Motion to Dismiss.

III. STANDARDS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief can be granted. In determining the propriety of a Rule

12(b)(6) dismissal, a court may not look beyond the complaint. Schneider v. Cal. Dept. of Corr., 151 F.3d 1194, 1197 (9th Cir. 1998).

A claim may be dismissed as a matter of law for one of two reasons: “(1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory.” Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). “A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court “must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party.” Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). However, “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim.” Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996).

A claimant need not set out in detail the facts upon which the claim is based. Gibson, 355 U.S. at 47. “To the contrary, all the [Federal Rules of Civil Procedure] require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.” Id. In the event a pleading is dismissed for failure to state a claim, leave to amend must be granted unless the court determines that allegations of other facts could not cure the deficiency. Bonanno v. Thomas, 309 F.2d 320, 322 (9th Cir. 1962).

IV. DISCUSSION

A. Unfair Competition Law (Section 17200)

HP contends that Plaintiffs' Unfair Competition Law claim, under Cal. Bus. & Prof. Code § 17200 ("§ 17200"), must be dismissed for three reasons: (1) Plaintiffs have failed to plead the existence of a defect or HP's presale knowledge of a defect with the particularity required by Federal Rule of Civil Procedure 9(b); (2) Plaintiffs cannot state a § 17200 claim based on HP's representations; and (3) the statements in HP's warranty are not likely to deceive a reasonable consumer. (Defendant Hewlett-Packard Company's Notice of Motion and Motion to Dismiss Plaintiffs' Complaint at 5-13, hereafter, "Motion," Docket Item No. 11.)

1. Applicability of Federal Rule of Civil Procedure 9(b)

The parties dispute whether Plaintiffs' allegations are grounded in fraud such that Rule 9(b)'s heightened pleading standard applies. HP characterizes Plaintiffs' claim as "one of omission and concealment; that HP knew of a common defect among Pavilion computers, but disregarded that knowledge and sold the defective computers to the public without disclosing the defect's existence." (Motion at 6.) Plaintiff characterizes its claim as alleging that "HP sold defective notebooks, failed to adequately repair them, and then refused to repair them at all unless the owner agreed to pay an exorbitant sum that bore no relation to HP's actual cost to repair." (Plaintiffs' Opposition to Defendant's Motion to Dismiss at 8, hereafter, "Opposition," Docket Item No. 14.)

Rule 9(b) provides, "In all averments of fraud or mistake, the circumstance constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). The heightened pleading requirement applies to claims for which fraud is an essential element and to claims in which the plaintiff relies on the fraudulent conduct as the basis for the claim. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003). Under California law, fraud and misrepresentation claims require (1) a false representation (2) made with knowledge of its falsity and (3) intent to defraud, (4) the victim's justifiable reliance on the misrepresentation, and (5) damages. Anthony v. Yahoo! Inc., 421 F. Supp. 2d 1257, 1260 (N.D. Cal. 2006) (quoting Stansfield v. Starkey, 220 Cal. App. 3d 59, 72-73 (1990)). Averments of fraud must be accompanied by the "who, what, when, where, and how" of the misconduct charged. Vess, 317 F.3d at 1103 (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)). Specifically, the plaintiff must "set forth what is false or misleading about a statement and why it is false." Id. (citing Decker v. Glenfed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994)).

Plaintiffs allege, *inter alia*, that HP engaged in unfair, unlawful, and or fraudulent business acts and practices by:

a. Selling Pavilions with a known defect;

b. Concealing and/or omitting the true facts about the defect;

c. Requiring consumers to pay for the repair of computers with a known defect;

d. Falsely representing that the Pavilion is "free from defects in materials or workmanship;"

e. Falsely representing the reliability, durability, and mobility of the Pavilion; and

f. Violating Federal Trade Commission Act, Section 5 by misrepresenting the reliability of goods and employing unfair and deceptive practices in the repair of such goods.

(Complaint ¶ 36.) Under Vess, false representations are allegations that sound in fraud. 317 F.3d at 1106-07. Some of the allegations supporting Plaintiffs' § 17200 claim explicitly sound in fraud, including, *inter alia*, HP's allegedly false representations regarding the reliability, durability, and mobility of the Pavilion laptops, and the absence of "defects in materials or workmanship." The Court finds that Plaintiffs have failed to satisfy Rule 9(b)'s heightened pleading requirement because they do not allege (1) that HP made any representations concerning the Pavilions with knowledge of their falsity or (2) that HP knew about the relevant defects (and made misrepresentations) when Plaintiffs in particular purchased their Pavilions. Furthermore, Plaintiffs have not alleged that HP intended to defraud them.

Accordingly, the Court dismisses Plaintiffs' First Cause of Action for violation of § 17200 with leave to amend.

2. Standing

Although Plaintiffs' Section 17200 claim is subject to dismissal in its entirety under Rule 9(b), the Court further holds that Plaintiffs lack standing to maintain a § 17200 claim.

HP contends that Plaintiffs failed to plead actual injury and causation under § 17200 as amended by Proposition 64. (Motion at 9.) Additionally, the parties dispute whether under § 17200, a plaintiff must allege reliance. (Motion at 9; Opposition at 14-15.)

Section 17200 defines unfair competition as any “unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.” Cal. Bus. & Prof. Code § 17200. To have standing following California voters' 2004 approval of Proposition 64, a private plaintiff must allege (1) injury-in-fact and (2) a loss of money or property as a result of unfair competition. Californians for Disability Rights v. Mervyn's LLC, 39 Cal. 4th 223, 229 (2006); Cal.

Bus. & Prof. Code §§ 17203, 17204. The California Supreme Court has not yet addressed whether there is a reliance requirement under the UCL, and the California federal district courts to consider the question are divided. Compare Anunziato v. eMachines, Inc., 402 F. Supp. 2d 1133, 1137-39 (C.D. Cal. 2005) (finding no reliance requirement) with Laster v. T-Mobile, Inc., 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005) (finding reliance requirement).

Here, Plaintiffs have alleged that they suffered an injury-in-fact: laptop display problems that manifested after the expiration of their warranties, and HP's refusal to repair post-warranty defects free of charge. (Complaint ¶¶ 26-27.) However, neither Plaintiff has alleged specifically that *their* loss occurred as a result of acts that HP committed in violation of § 17200.[1] The Court finds that Plaintiffs have failed to allege facts sufficient to satisfy § 17200's standing requirement.[2]

B. Breach of Express Warranty

HP contends that Plaintiffs' breach of express warranty claim fails for four reasons: (1) Plaintiffs have not alleged the existence of a defect covered by HP's limited warranty; (2) Plaintiffs are contractually time-barred from bringing this action; (3) Plaintiffs fail to allege each of the elements of a breach of express warranty; and (4) Plaintiffs fail to allege privity of contract between the parties required to state a claim for breach of express warranty. (Motion at 14.)

An express warranty is a contractual term concerning some aspect of the sale, such as the quality of the warranted item. Windham at Carmel Mountain Ranch Ass’n v. Superior Court, 109 Cal. App. 4th 1162, 1168 (2003). In California, a plaintiff states a prima facie case for breach of express warranty by alleging (1) the exact terms of the warranty; (2) reasonable reliance; and (3) a breach of warranty which proximately causes the plaintiff's injury. Williams v. Beechnut Nutrition

---

[1] In light of the uncertainty whether § 17200 private plaintiffs must allege reliance, the Court's holding that Plaintiffs have failed to meet § 17200 standing requirement is not predicated on their failure to allege reliance. Rather, the holding is based on Plaintiffs' general failure to connect their alleged loss with HP's alleged acts violating § 17200.

[2] HP also contends that (1) Plaintiffs' Section 17200 claim is based on alleged "generalized, vague and unspecific statements" by HP that constitute mere puffery and (2) the remainder of HP's alleged representations are unlikely to deceive a reasonable consumer. (Motion at 9-13.) Since the Court finds that Plaintiffs have not alleged facts to support § 17200 standing and have not satisfied Rule 9(b)'s heightened pleading standard, the Court need not consider these remaining arguments.

Corp., 185 Cal. App. 3d 135, 142 (1986). When a consumer relies on representations made by a manufacturer in labels or advertising material, recovery is allowable on a theory of express warranty without a showing of privity. Fundin v. Chicago Pneumatic Tool Co., 152 Cal. App. 3d 951, 957 (1984).

HP contends that Plaintiffs' claims are contractually time-barred because the alleged malfunctions of their laptops occurred after the warranties expired. (Motion at 15.) Express warranties are contractual in nature. See, e.g. Mocek v. Alfa Leisure, Inc., 114 Cal. App. 4th 402, 406 (2003). The general rule is that an express warranty does not cover a defect that manifests after the applicable time period has elapsed. Daugherty v. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 830 (2006). In this case, Long has alleged that his laptop screen began malfunctioning two months after he purchased it. (Compl. ¶ 26.) A month before the warranty expired, he sent his laptop to HP, and HP repaired the screen. Id. Four months after the warranty elapsed, the screen problems recurred, and HP quoted him $600 to repair the notebook because it was out of warranty. Id. Simien's laptop screen began to flicker within the first few months of her purchasing the notebook. (Compl. ¶ 27.) Two months after her warranty expired, the screen failed such that Simien could not use her notebook without an external monitor. Id. Both Plaintiffs have alleged laptop defects that manifested after their express warranties expired. HP could not, as a matter of law, have breached its express warranty by refusing to repair these defects. Accordingly, the Court dismisses Plaintiffs' Second Cause of Action for breach of express warranty with prejudice.[3]

V. CONCLUSION

The Court GRANTS HP's Motion to Dismiss. Plaintiffs are granted leave to amend their First Cause of Action for violation of Cal. Bus. & Prof. Code § 17200. The Second Cause of Action for Breach of Express Warranty is dismissed with prejudice.

---

[3] Since the Court finds that Plaintiffs' claims for breach of express warranty are contractually time-barred, the Court need not consider HP's remaining arguments.

If Plaintiffs wish to file an Amended Complaint, Plaintiffs shall file within 30 days from the date of this Order. If no Amended Complaint is filed within 30 days, the case will be dismissed pursuant to Rule 41(b) of Fed. R. Civ. P. In light of this Order, all previously set case schedule deadlines are vacated.

Dated: December 21, 2006

JAMES WARE
United States District Judge

THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:

Charles David Marshall CAND.USCOURTS@classcounsel.com
Howard Holderness hholderness@morganlewis.com
Jenelle Welling JWW@classcounsel.com
John F. Schultz john.schultz@morganlewis.com
Meredith Ann Walworth mwalworth@morganlewis.com
Michael J. Holston mholston@morganlewis.com
Robert S. Green RSG@CLASSCOUNSEL.COM
Thomas R. Green tgreen@morganlewis.com

Dated: December 21, 2006 **Richard W. Wieking, Clerk**

By: /s/ JW Chambers
Elizabeth C. Garcia
Courtroom Deputy